Supreme Court, U.S.
FILED
061163 DEC 22 2007
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 2006

GERALD BARNES,

Petitioner,

v.

TYLER INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For a Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

James W. Volberding
Member of the Bar of the United States Supreme Court

One American Center
909 E.S.E. Loop 323, Suite 700
Tyler, Texas 75701
(903) 597-6622 (Phone), (903) 597-5522 (Fax)

Counsel for Petitioner

QUESTIONS PRESENTED

When Gerald Barnes, 59, sought to prove to a jury the subjective intent of his employer, the Tyler Independent School District, to discriminate against him on the basis of his race when it reorganized and reduced him from assistant superintendent to supervisor over bus transportation, he offered a copy of a 1970 federal desegregation order still in force against the district, with which the district could not document that its reorganization plan complied.

The trial court held that the 1970 order was not relevant to Mr. Barnes' suit. The Court of Appeals for the Fifth Circuit went farther and said that such desegregation orders "apply only in the desegregation context and not to a school district's everyday employment decisions."

1. Do 1970s era school desegregation orders apply only in the context of desegregation enforcement actions, long past, and not to school districts' current staff reorganizations and reductions?

2. In a civil rights lawsuit under Title VII of the Civil Rights Act of 1964, is an still active and enforceable 1970 school desegregation order relevant to show a school district's subjective intent to discriminate?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RULES OF EVIDENCE INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The 1970 Desegregation Order Was Relevant To Show That Barnes' Alleged Disparate Treatment Was Intentional. 4

II. The Fifth Circuit's Opinion Holds Too Broadly, Effectively Terminating All Standing School Desegregation Orders. 11

III. The Court Should Grant Review To Determine Whether School Desegregation Orders Are Merely Historical Documents Applicable Only During Desegregation, and To Establish The Test For Whether a Desegregation Order is Relevant to a Jury's Analysis of Whether a School District Intentionally Discriminated. 14

Page

CONCLUSION 16

CERTIFICATE OF SERVICE 17

APPENDIX ..... App. 1

App. A: Aug. 24, 206 Order of the United States Court of Appeals for the Fifth Circuit ..... App. 1

App. B: September 25, 2006 Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing ..... App. 6

App. C: *United States v. Tyler Independent School* District, No. 5176 Order (E.D. Tex. Jul. 27 1970) (unpublished) ..... App. 7

App. D: June 10, 2005 Order of the United States District Court on Summary Judgment .... App. 11

App. E: June 16, 2005 Order of the United States District Court on Final Judgment ..... App. 25

TABLE OF AUTHORITIES

Page

CASES

Amburgey v. Corhart Refractories Corp.,
936 F.2d 805 (5th Cir. 1991) 11

Barnes v. Jones County School District,
544 F.2d 804 (5th Cir. 1977) 12-14

Burns v. Texas City Refining, Inc.,
890 F.2d 747 (5th Cir. 1989) 10

Dickerson v. State of N.J. Dep't of Human Serv.,
767 F. Supp. 605 (D.N.J. 1991) 9

E.E.O.C. v. Indiana Bell, 256 F.3d 516 (7th Cir. 2001) .. 10

Failla v. City of Passaic, 146 F.3d 149 (3rd Cir. 1998) ... 9

Freeman v. Pitts, 503 U.S. 467 (1992) 15

Garrett v. Hewlett - Packard Co.,
305 F.3d 1210 (10th Cir. 2002) 11

Hemphill v. Schott, 141 F.3d 412 (2d Cir. 1998) 15

Johnson v. Ganim, 342 F.3d 105 (2d Cir. 2003) 15

Lee v. Russell County Bd. of Educ.,
563 F.2d 1159 (5th Cir. 1977) 12

Page

Little v. Republic Refining Co.,
924 F.2d 93 (5th Cir. 1991) 10

Pickens v. Okolona Municipal Separate School Dist.,
527 F.2d 358 (5th Cir. 1976) 13

Reeves v. General Foods Corp.,
682 F.2d 515 (5th Cir. 1982) 10

Thornbrough v. Columbus & Greenville R. Co.,
760 F.2d 633 (5th Cir. 1985) 10

United States v. State of Texas,
457 F.3d 472 (5th Cir. 2006) 15

United States v. Tyler Indep. Sch. Dist.,
No. 5176 Order (E.D. Tex. Jul. 27 1970) 5

Walther v. Lone Star Gas Co.,
952 F.2d 119 (5th Cir. 1992) 10

STATUTES

28 U.S.C. § 1254 (2006) 2

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964,
AS AMENDED, 42 U.S.C. § 2000E-3 3

RULES

FED. R. EVID. 401 ..... 3, 9, 11, 14, 15

FED. R. EVID. 402 ..... 3, 9, 11, 14, 15

PETITION FOR WRIT OF CERTIORARI

Gerald Barnes, 59, a supervisor over transportation at the Tyler Independent School District ("the District") in Tyler, Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding August 24, 2006, in order to resolve proper interpretation of Rules 401 and 402 of the Federal Rules of Evidence when applied to a civil rights case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is unpublished by order of the Fifth Circuit. It is reprinted in the Appendix hereto ("App.") at page App. 1. By order filed September 25, 2006, the Fifth Circuit denied Barnes' motion for rehearing. It is reprinted in the Appendix hereto at page App. 4.

JURISDICTION

On August 29, 2004, Gerald Barnes filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3. The case was tried by jury June 14, 2005 before a United States Magistrate Court by mutual consent. Judgment was entered against Barnes and in favor of the District on June 17, 2005.

On July 15, 2005, Barnes filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. On August 24, 2006, The Court of Appeals rejected Barnes' appeal and affirmed the judgment of the lower court. App. 1.

Barnes filed a motion for rehearing. The Court of Appeals denied the motion for rehearing September 25, 2006. App. 4.

Pursuant to Supreme Court Rule 13.1, this petition has been timely filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254.

RULES OF EVIDENCE INVOLVED IN THIS CASE

Federal Rule of Evidence 401. Definition of "Relevant Evidence" "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

STATEMENT OF THE CASE

Mr. Barnes, 59, is currently the supervisor of bus transportation for the Tyler Independent School District in Tyler, Texas. Previously, he held a higher position, that of assistant superintendent. He has worked for the District for thirty-one years.

In 2003, the District hired a new superintendent, David Simmons, who soon reorganized the administrative staff. Mr. Barnes was reassigned from assistant superintendent to the lower position of supervisor of bus transportation and his salary reduced slightly.

Following administrative proceedings, Mr. Barnes filed a civil rights complaint in U.S. District Court in Tyler August 29, 2004 against Tyler Independent School District and the superintendent. He contended that his demotion constituted racial discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3. He also alleged retaliation and intentional infliction of emotional distress.

The parties consented to proceed before a United States Magistrate Judge. On motion for summary judgment, the court dismissed Dr. Simmons from the suit, and dismissed Mr. Barnes' claim for intentional infliction of emotional distress, but permitted his claim of Title VII racial employment discrimination to proceed.

During a pre-trial conference, Mr. Barnes sought to introduce a certified copy of a still standing 1970 desegregation order entered against the District by the United States District Court for the Eastern District, the same district in which Mr. Barnes' suit was pending. Mr. Barnes sought to introduce the 1970 order as evidence of the District's intent to discriminate, by then showing non-compliance with the order. The court denied admission of the 1970 order.

At the conclusion of a one-day trial, the eight-person jury returned a verdict that the District did not discriminate against Mr. Barnes. (Tr. 3:196.) The court signed and entered a final judgment that Barnes take nothing.

Upon Barnes' appeal, the United States Court of Appeals for the Fifth Circuit affirmed, in an unpublished opinion, App. A-1, holding that the 1970 desegregation order did not satisfy the relevancy requirements of Federal Rules of Evidence 401 and 402. First, the Court of Appeals held that

"Even if TISD's decision to demote Barnes was legally governed by the order, the order prescribes merely one method of making non-discriminatory hiring decisions and is by no means the only non-discriminatory way for the school district to make those decisions." App. A-2.

Second, the Court of Appeals concluded firmly "that desegregation orders such as the 1970 TISD order apply only in the desegregation context and not to a school district's everyday employment decisions." App. A-3.

Third, the Court decided that "introducing the 1970 order into evidence would have created a danger of confusing the issues and misleading the jury, as warned against by rule 403." App. A-3.

Mr. Barnes' motion for rehearing was denied. App. A-4.

REASONS FOR GRANTING THE WRIT

I. The 1970 Desegregation Order Was Relevant To Show That Barnes' Alleged Disparate Treatment Was Intentional.

Conceding a possibility that the desegregation order – which expressly addresses discriminatory employment actions – might "legally govern[]" the decision to demote Barnes, the court ruled the 1970 order irrelevant because "the order prescribes merely one method of making non-discriminatory hiring decisions and is by no means the only non-discriminatory way for the school district to make those decisions." *Barnes v. Tyler Indep. Sch. Dist.*, slip op. at 2, App. 2.

Before 1970, African-Americans in Tyler, a small town in East Texas, were segregated from local whites and educated in separate schools with fewer resources and inferior

conditions. In the late 1960s, civil rights litigation challenged the status quo, culminating in a three-page 1970 United States District Court order which not only barred the Tyler Independent School District from racial discrimination but created a series of procedures for administering the school district in a non-discriminatory manner. *See United States v. Tyler Indep. Sch. Dist.*, No. 5176 Order (E.D. Tex. Jul. 27 1970) (unpublished) (hereinafter, "the 1970 Order" or "the 1970 TISD Order"). A copy of this order appears in the Appendix at App. 5.

In pertinent part, the order instructed the District that:

> If there is to be a reduction in the number of principals, teachers, teachers-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, ... Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.
>
> "Demotion" used as above includes any re-assignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously. . . ."

United States v. Tyler Indep. Sch. Dist., No. 5176 Order (E.D. Tex. Jul. 27 1970) at 2, App. 6.

From 1975 to today, Barnes served the District in several positions, including assistant principal and principal, before becoming one of its two assistant superintendents, a senior position second only to the superintendent. As assistant superintendent, he had wide responsibility over the District's operations, which served more than 18,000 students. Mr. Barnes is African-American.

In 2003 a new school superintendent proposed and implemented a restructuring and cost reduction plan. Under the plan, several positions were eliminated and others reorganized.

The new superintendent's organization plan demoted Mr. Barnes from assistant superintendent to supervisor of transportation (he was placed in charge of running the school buses), a position with less responsibility. His office was moved from the central office to an annex building where the buses were parked and serviced. (Tr. 3:81.) He was no longer part of the leadership team. (Tr. 3:99.) His salary was reduced slightly.

Mr. Barnes protested the demotion and discussed the matter with his superiors but could not resolve the disagreement. On April 29, 2004, he filed a complaint in United States District Court in Tyler alleging racial discrimination.

At a pre-trial hearing June 13, 2005, the court pre-admitted all exhibits. Only one of Mr. Barnes' exhibits was contested. The exhibit was a copy of the 1970 TISD desegregation and administration order signed by the United States District Court. The court excluded the order.

The one-day trial proceeded the next day cordially and without incident. The court sustained one of Mr. Barnes' two *Batson* challenges to two African-Americans struck by the District, placing the minority juror on the five-man, three-woman jury. (Tr. 3:36-38.)

Three witnesses testified. The first, Mrs. Sharon Roy, the District's Director of Human Resources, described the

reorganization plan and its effect on Mr. Barnes. (Tr. 3:62, 64-65.) Mrs. Roy explained that the Director of Transportation announced her retirement, evidently in May 2003. The superintendent decided to place Mr. Barnes in that position. (Tr. 3:67.) Under the old organization, the Director of Transportation reported to Mr. Barnes, as assistant superintendent. (Tr. 3:68.) She told jurors that seventeen administration positions were affected or eliminated by the reorganization. (Tr. 3:89.) Of these, two were held by African-Americans, and fifteen were held by whites. Of the two African-Americans, one retired but was later rehired as a teacher. (Tr. 3:69-70.) The other was Mr. Barnes.

Of the remaining fifteen whites, twelve retired or resigned; no one was fired. (Tr. 3:69.) Several were later rehired. (Tr. 3:71-72; Plf. Exh. 4.) Moreover, several new employees were hired from outside the district. (Tr. 3:71-74.)

Mrs. Roy explained that the change of title of Director of Transportation to Supervisor of Transportation was merely a name change; the duties remained unchanged: running the buses. (Tr. 3:77.) Mr. Barnes, however, had never before driven a bus. (Tr. 3:75.)

Mrs. Roy told jurors that the other assistant superintendent under the old organization, who was white, was assigned to a position as a director. (Tr. 3:78-79.) Unlike his black counterpart, Mr. Barnes, the white assistant superintendent was not required to apply for the position. (Tr. 3:79.)

Mrs. Roy identified several others in the District's senior administration who were minorities, including herself. (Tr. 3:92-93.) She pointed out that the titles and jobs of other District staff, women and men, white and minorities, were changed. (Tr. 3:95-96.) The salaries of most, however, were unaffected. (Tr. 3:98-99, 100.)

The student body of the District remains approximately one-third white, one-third Hispanic, and one-third African American. (Tr. 3:100.)

Mr. Barnes testified next. He explained that in reality he had been demoted from a senior position as assistant superintendent to a subordinate position as supervisor. He believed that his race was the reason. Mr. Barnes, who holds two masters degrees, joined the District in 1975. (Tr. 3:103.) He has served as teacher, assistant principal, principal and then assistant superintendent. (Tr. 3:103-04.)

As assistant superintendent, he had broad responsibilities over a range of departments, including the buses. (Tr. 3:105.) Everyone else learned of his or her new position in late March 2003 when the reorganization was published. (Tr. 3:107.) Mr. Barnes was not listed. (Tr. 3:108.) Others were, including the other assistant superintendent, who was now a director. The position of transportation supervisor was listed as open. (Tr. 3:108.) Mr. Barnes learned of his new assignment as supervisor of transportation two months later at the beginning of June 2003. (Tr. 3:107, 111.) His salary was cut but the other white assistant superintendent's was not. (Tr. 3: 112, 115-16.)

When he saw that his name was not listed in the March 25, 2003 reorganization plan, Mr. Barnes spoke to Mrs. Roy, the personnel director, who indicated that the superintendent had not yet made a decision. (Tr. 3:110-11.) In the same period Mr. Barnes received his annual appraisal, and was shocked to see the first below expectations ratings he had seen in his then 27 years with the District. (Tr. 3:116; Plf. Exh. 5.) He received no warning. (Tr. 3:116, 118, 119.)

Mr. Barnes explained to jurors the subtle reasons why he believed that his race was a motivating factor in the superintendent's decision to demote him. First, earlier, during the reorganization, he had received what he thought was the superintendent's firm verbal commitment for his reassignment

to the position of director, by which he would have remained part of the District's decision making senior management. (Tr. 3:124.)

Second, the two assistant superintendents were treated differently. The white one was reassigned as a director with corresponding responsibility and no change in salary, while the black one, Barnes, was reassigned to a lower position, in the bus barn, with less responsibility and lower salary. (Tr. 3:124-25.)

Third, Mr. Barnes felt that because his role as assistant superintendent required him to resolve contentious student placement issues and arbitrate disputes between students, parents, and principals, these conflicts led principals to complain to the new superintendent. Barnes suspected race was an aspect of these complaints.

The final witness, Dr. David Simmons, the District superintendent, elaborated on the plan and denied that the race of any employee influenced his decisions. (Tr. 3:147-48, 164-65.) He said that the reorganization was designed to reduce costs and improve efficiency. (Tr. 3:161-63.)

He delayed appointing Mr. Barnes as transportation supervisor to allow him to apply for open positions if he wished. (Tr. 3:158.) Second, he thought that positions might open up where he might need Mr. Barnes, although he evidently did not tell Mr. Barnes. (Tr. 3:158-59.)

The jurors delivered a verdict that the District had not discriminated against Mr. Barnes on the basis of his race. (Tr. 3:196.) But jurors never learned of the 1970 desegregation order, which still governed district reorganizations involving staff reductions and which required the District to take certain steps to assure that reductions were non-discriminatory. The 1970 order was both relevant and critical to proving the District's discriminatory intent, one element of his case imposed by Title VII.

Ordinarily, such orders are admissible. *See, e.g., Failla v. City of Passaic*, 146 F.3d 149, 159-60 (3rd Cir. 1998) (prior judgment showing plaintiff received worker's compensation award was relevant to show his disability); *Dickerson v. State of N.J. Dep't of Human Serv.*, 767 F. Supp. 605, 612 (D.N.J. 1991) (recognizing the probative value of an EEOC determination). "But district courts may not exclude as 'irrelevant' under Rules 401 and 402 any evidence bearing on the defendant's state of mind . . . ." *E.E.O.C. v. Indiana Bell*, 256 F.3d 516, 528 (7th Cir. 2001) (en banc) (holding that collective bargaining agreement is relevant to show company's innocent state of mind in response to punitive damages).

Moreover, the probative value of the 1970 order was high. The 1970 order required the District to create documents and retain them to show that any dismissals or demotions of minorities were conducted evenly and that all minorities affected were allowed first choice of alternative jobs. The District had no such paperwork. The absence of the required documentation would have been excellent proof for Mr. Barnes of the District's subjective intent to discriminate on the basis of race.

In a discrimination case, it is rare that a defendant will admit intentional discrimination. Rather, "motivation and intent in employment discrimination cases can often be proved only through circumstantial evidence." *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 123 (5th Cir. 1992) (*citing Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 641 (5th Cir. 1985), and *Burns v. Texas City Refining, Inc.*, 890 F.2d 747, 751 (5th Cir. 1989) ("It is certainly not necessary, and indeed is often impossible, for the plaintiff in a discrimination case to prove the defendant's state of mind through direct evidence.")) The 1970 order, combined with the District's abject failure to follow its directives, would be circumstantial proof of discrimination.

Under Fifth Circuit law, when a defendant offers a valid, nondiscriminatory explanation for adverse treatment of the employee, the plaintiff is "required to produce sufficient evidence from which a reasonable trier of fact could conclude that [the defendant's] explanation was pretextual." *Walther*, 952 F.2d at 123 (*citing Little v. Republic Refining Co.*, 924 F.2d 93, 96-98 (5th Cir. 1991), and *Reeves v. General Foods Corp.*, 682 F.2d 515, 521-23 (5th Cir. 1982)). "A plaintiff may demonstrate pretext either by showing that a discriminatory motive more likely motivated the employer or that the employer's explanation is unworthy of credence." *Walther*, 952 F.2d at 123 (*citing Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 813 (5th Cir. 1991)). Procedural failures on the level committed by the District here can furnish evidence of pretext. *See Garrett v. Hewlett - Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) ("[E]vidence of pretext may include, . . . disturbing procedural irregularities").

For these reasons, therefore, the 1970 desegregation was admissible to prove subjective intent in a Title VII racial discrimination case. The Fifth Circuit, however, ruled otherwise.

II. The Fifth Circuit's Opinion Holds Too Broadly, Effectively Terminating All Standing School Desegregation Orders.

As mentioned, the Fifth Circuit rejected Mr. Barnes' argument that the 1970 desegregation order was relevant to prove discriminatory intent. The question presented to the Fifth Circuit was whether the District's knowledge of this order and the non-compliance with obligations it imposes would have helped Mr. Barnes show jurors objective proof of the District's subjective intent to select him for demotion on the basis of his race, and therefore admissible under Rules of Evidence 401 and 402. Mr. Barnes argued that the Court of Appeals was not

required to decide whether jurors would have actually decided in his favor at trial had they known of the violation of the 1970 order. Explaining the threshold of relevance established by Rules 401 and 402, he contended that the court merely needed to conclude that the order would have substantially aided his difficult undertaking to unmask his opponents' subjective intent in the face of their denials.

In this case, the Court of Appeals appears to have relegated desegregation orders to the category of historical orders and therefore limited to "the desegregation context and not to a school district's everyday employment decisions." *Barnes v. Tyler Indep. Sch. Dist.*, slip op. at 3, App. 3 (footnote omitted). For this conclusion, the Fifth Circuit cited its own prior decision in *Lee v. Russell County Bd. of Educ.*, 563 F.2d 1159, 1161 (5th Cir. 1977). *Barnes*, slip op. at 3 n.1, App. 3. But it is unclear where this reasoning appears in *Lee,* let alone that the reasoning is correct. *Lee* states, "The application of *Singleton*'s dismissal and demotion standards is limited to the particular problem of a smaller faculty caused by school desegregation." *Lee*, 563 F.2d at 1161. This, of course, is true. A *Singleton* analysis of personnel actions does not apply in every personnel change. The Fifth Circuit, however, does not appear to have ever gone so far as to hold that the analysis is *limited* only to formal desegregation from dual to unitary systems. Instead, *Singleton* applies when there has been a reduction in force in a school district which in the past maintained a segregated educational system, circumstances which exist here. (The District here reduced the number of administrators, achieved through resignations and retirements, not firings.)

In *Barnes v. Jones County School District*, 544 F.2d 804 (5th Cir. 1977), cited by *Lee*, the Court explored a challenge by a teacher of her treatment following a 1970 school desegregation from a segregated educational system into a unitary one. The Court of Appeals explained that merely

because the school district had reorganized into a unitary system did not mean that the *Singleton* analysis no longer applied to the district. *Jones Cty. Sch. Dist.*, 544 F.2d at 806-07. Some time was required to pass before a district could claim successful transition to a unitary plan. The Court of Appeals did not specify a number of years. Apparently it recognized that vestiges of discrimination could remain for some time. The Court of Appeals, incidently, found that the *Singleton* criteria did not apply to Mrs. Ether Barnes' claim because there was not a net decrease in staff during the year she challenged. *Jones Cty. Sch. Dist.*, 544 F.2d at 806-07. By contrast, the purpose of the Tyler Independent School District's reorganization was to reduce staff, clearly triggering one of *Singleton*'s criteria.

Moreover, the Court of Appeals' conclusion that standing federal education orders such the District's 1970 order are limited to "demotions or dismissals caused by desegregation" appears to contradict the Court of Appeals' 1977 stated position in *Jones Cty. Sch. Dist.* in which the Court of Appeals held that *Singleton* was not designed to be a "tool for all desegregating systems, or for all desegregating systems in which there are fewer black faculty members than there were during the preceding year." *Jones Cty. Sch. Dist.*, 544 F.2d at 807. Rather, *Singleton*, a massive *en banc* decision, applied when "there is a reduction in force," otherwise, "the black faculty member claiming racially discriminatory discharge or demotion proceeds under the Fourteenth Amendment."

Pickens v. Okolona Municipal Separate School Dist., 527 F.2d 358, 362 (5th Cir. 1976), also cited by *Lee*, has stronger language. There, the Fifth Circuit said that "a dismissal or failure to rehire an individual teacher will not create a *Singleton* reduction where the absolute number of available positions remains the same or increases. . . . In the absence of any demonstrated desegregation related reduction in the number of teaching slots, *Singleton* standards do not apply."

Pickens, 527 F.2d at 362. In Gerald Barnes' case, unlike in *Pickens*, the District's reorganization plan led to a reduction in staff, achieved through retirements and resignations; therefore, *Singleton* is implicated.

Mr. Barnes has shown that there was "a reduction in force" by the District, which triggers *Singleton*, and therefore makes the 1970 order relevant to whether Mr. Barnes, a "black faculty member," may prove to a jury under Title VII that he suffered a "racially discriminatory discharge or demotion," thereby establishing a violation "under the Fourteenth Amendment." *See Jones Cty. Sch. Dist.*, 544 F.2d at 807. Mr. Barnes, therefore, successfully linked together all necessary components of a viable Title VII and Fourteenth Amendment claim of racial discrimination. The only evidence missing for the jury was the 1970 TISD order which was relevant under Rules of Evidence 401 and 402 to illuminate the District's subjective intent.

III. The Court Should Grant Review To Determine Whether School Desegregation Orders Are Merely Historical Documents Applicable Only During Desegregation, and To Establish The Test For Whether a Desegregation Order is Relevant to a Jury's Analysis of Whether a School District Intentionally Discriminated.

This case presents the opportunity to determine whether school desegregation orders, largely from the 1970s, are merely historical documents applicable only during desegregation actions, or whether they continue to govern school staff reductions. The appeal also presents the opportunity to establish the relevance test for determining whether an extant 1970 school desegregation order, designed to prevent residual continuing discrimination in a district which has long suffered the effects of racial segregation, is relevant to a jury's

evaluation of the subjective intent of school administrators. The Court of Appeals for the Fifth Circuit appears to have created an inappropriate test.

First, the Court of Appeals concluded that "it is inaccurate to assume that a hiring decision that does not abide by the terms of the 1970 order is more likely to be discriminatory than is any other hiring decision." *Barnes*, slip op. at 2, App. 2. In the sentences preceding this statement, the Court of Appeals correctly observed that the District's subjective intent is one of Mr. Barnes' Title VII elements of proof. The Court of Appeals appears to be confusing the analysis for proof of subjective intent with the analysis for proof of violation of a desegregation order. The range of proof permitted to prove subjective intent is much broader. *See, e.g., Johnson v. Ganim*, 342 F.3d 105, 117 (2d Cir. 2003) ("Though the qualified immunity inquiry is generally an objective one, a defendant's subjective intent is indeed relevant in motive-based constitutional torts such as the one alleged by [plaintiff]."); *Hemphill v. Schott*, 141 F.3d 412 (2d Cir. 1998) (sufficient facts about motive found to warrant trial).

A jury could infer that the District's failure either to seek discharge or release from the 1970 order or to document its compliance with the 1970 order would support an inference of intentional discrimination, even though such failure might be insufficient alone in a suit to enforce the 1970 order. Similarly, a jury might in fact have concluded that the District's failure to comply with the terms of the 1970 order, in a staff reorganization resulting in reductions, revealed the District's intent to discriminate. Since intentional discrimination was an element of Mr. Barnes' burden of proof, the 1970 order was relevant, and therefore admissible under Rules of Evidence 401 and 402.

Without the Court's intervention, the Fifth Circuit appears willing to continue marginalizing desegregation orders. Recently, the Fifth Circuit referred to a school desegregation

order currently applicable in Hearne, Texas as a "now-antiquated Order" of "dwindling relevance." *United States v. State of Texas*, 457 F.3d 472, 475 (5th Cir. 2006). Such dismissal of desegregation orders appears to be at odds with *Freeman v. Pitts*, 503 U.S. 467 (1992), in which the Court held that district courts were permitted to relinquish supervision of a school system which is largely, but not entirely, in compliance with a desegregation degree. The Court recognized in 1992 that desegregation orders have continuing vitality, observing that "vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist." *Freeman*, 503 U.S. at 495.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted this February 2007.

JAMES W. VOLBERDING
Texas State Bar 00786313
Member of the Bar of the
United States Supreme Court

One American Center
909 E.S.E. Loop 323, Suite 700
Tyler, TX 75701
(903) 597-6622 (Phone)
(903) 597-5522 (Fax)
Email: volberding@attglobal.net

Counsel for Petitioner

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of **Gerald Barnes' Petition for Writ of Certiorari** was served upon counsel for Respondent by hand-delivery this same day to:

Mr. John C. Hardy, III
Hardy, Atherton & Cook, P.C.
One American Center
909 E.S.E. Loop 323
Suite 750
Tyler, TX 75701
Email: john@hardylaw.com

All parties required to be served have been served. I am a member of the Bar of this Court.

JAMES W. VOLBERDING

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

GERALD BARNES, Appellee,

V

TYLER INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

DOCKET NO. 05-41162

DECIDED: AUGUST 24, 2006.

Before SMITH, GARZA, and PRADO,
Circuit Judges.

PER CURIAM*:

Gerald Barnes challenges the exclusion of evidence from the trial of his civil rights suit. For the following reasons, we affirm.

---

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

I.

Barnes sued Tyler Independent School District ("TISD") and its superintendent, David Simmons, after Barnes was demoted from Assistant Superintendent to Supervisor

of Transportation. According to TISD, Barnes's demotion was part of a district-wide plan to restructure the administration to promote efficiency and reduce expenses.

Summary judgment whittled Barnes's suit down to one claim against TISD of employment racial discrimination under title VII of the Civil Rights Act of 1964. At a pre-trial hearing, the court excluded, as irrelevant, one of Barnes's exhibits, a copy of the standing 1970 federal desegregation order issued against TISD. The jury found in favor of TISD.

On appeal, Barnes challenges only the exclusion of the 1970 order. The order imposed a number of procedural hiring requirements on TISD in an effort to ensure equal treatment of minority employees during the integration of the dual school system that had existed under segregation. Barnes argues that because TISD's decision to demote him did not comply with the terms of the order, the order should be admitted as evidence relevant to whether his demotion was motivated by discrimination.

II.

We review evidentiary rulings on for abuse of discretion. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 578 (5th Cir. 1993). "The trial court's discretion to admit or exclude evidence is generally broad, but competent evidence cannot be excluded without a sound and acceptable reason." *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 370 (5th Cir. 2000). We

will reverse an evidentiary ruling only after finding that the substantial rights of a party were affected. *Id.*

III.

Rule 401 of the Federal Rules of Evidence permits the introduction of evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Evidence that does not meet this description is inadmissible. FED. R. EVID. 402. Evidence is inadmissible when its relevance "is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury . . . ." FED. R. EVID. 403.

Barnes contends that the 1970 order was relevant to whether TISD intended to discriminate against him on the basis of his race when it demoted him. Such intentional discrimination is a required element of Barnes's title VII claim. *See* 42 U.S.C. § 2000e-2. The argument for the order's relevance is that showing a knowing violation of the order by TISD would tend to make it more likely that discriminatory intent existed. Barnes's challenge fails for three reasons.

First, it is inaccurate to assume that a hiring decision that does not abide by the terms of the 1970 order is more likely to be discriminatory than is any other hiring decision. Even if TISD's decision to demote Barnes was legally governed by the order, the order prescribes merely one method of making non-discriminatory hiring decisions and is by no means the only non-discriminatory way for the school district to make those decisions. TISD's decision to demote Barnes satisfies title VII if it was non-discriminatory, and whether the demotion complies with the 1970 order is irrelevant to that question.

Second, even if we assume that TISD's intentionally ignoring a desegregation order governing its decisions would be evidence of discriminatory intent, there remains a question whether the 1970 order actually covered TISD's decision to demote Barnes. If the order place no obligations on TISD in regard to Barnes, the text of the order is irrelevant to this case.

TISD claims that the order only governs employment decisions related to desegregation, and Barnes's demotion had nothing to do with desegregation. There is broad support for the proposition that desegregation orders such as the 1970 TISD order apply only in the desegregation context and not to a school district's everyday employment decisions.[1] Thus it is debatable whether TISD officials had any reason to consider the 1970 order before demoting Barnes.

It is not for us to decide here whether TISD was required to follow the 1970 order when it demoted Barnes. The burden was on Barnes to show the district court why his proffered exhibit was relevant to a material witness.

Barnes could have tried to lay a predicate for his exhibit by establishing that TISD was legally obligated by the order

---

[1] *See, e.g. Lee v. Russell County Bd. of Educ.*, 563 F.2d 1159, 1161 (5th Cir. 1977) (declaring that the state-wide desegregation criteria announced in *Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211 (5th Cir. 1970), apply only to "demotions or dismissals caused by desegregation" rather than to all employment decisions the school district makes. The desegregation plan announced in *Singleton* was nearly identical to that prescribed in the 1970 TISD order.

when it made the demotion decision, but he failed to do so. Thus even accepting Barnes's relevant theory – that TISD's failure to follow the terms of a legally binding desegregation order when demoting him would be evidence of discrimination against him – the challenge to the exclusion of the order fails, because Barnes has not established that the order applied to the demotion decision.

Finally, introducing the 1970 order into evidence would have created a danger of confusing the issues and misleading the jury, as warned against by rule 403. The school district was not on trial for violating the 1970 order; it was accused only of discriminating against Barnes in violation of title VII.

Barnes's admitted strategy was to link violations of the order to discrimination in the juror's minds. Allowing him essentially to try TISD for a violation of the 1970 order in the context of a title VII case would plainly have risked confusing the issues and misleading the jury as to the standard of liability.

Because the 1970 order arguably did not speak to any material issue in the case, arguably did not place any legal obligations on TISD in regard to Barnes, and was arguably more confusing than probative, the district court acted well within its broad discretion when it excluded the 1970 order. The judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

GERALD BARNES, Appellee,

V

TYLER INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

DOCKET NO. 05-41162

DATE: SEPTEMBER 25, 2006.

ON PETITION FOR REHEARING

Before SMITH, GARZA and PRADO,
Circuit Judges.

PER CURIAM:

The Petition for rehearing is out of time. The court has allowed the filing of the late petition for rehearing.

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA, Plaintiff,

V

TYLER INDEPENDENT SCHOOL DISTRICT, THE BOARD OF TRUSTEES OF THE TYLER INDEPENDENT SCHOOL DISTRICT, J. DONALD GUINN, President, E. W. CLAWATER, LEMUEL C., HUTCHINS, THOMAS SPROULE, MARTIN THEDFORD, MARTIN L., EDWARDS, and PHILIP W. TAYLOR, Members, JAMES SYLER, Superintendent of Schools of the Tyler Independent School District, Defendants.

DOCKET NO. 5176

JULY 27, 1970

JUSTICE, District Judge.

ORDER

On July 25, 1970, a hearing was held in this case on an order to show cause why defendants should not immediately implement a plan of desegregation for the 1970-71 school year. Findings of Fact and Conclusions of Law have been prepared. It is, therefore, ORDERED, ADJUDGED and DECREED that:

1. Defendants, their employees, agents and successors, and all persons in active concert or participation with any of them are hereby enjoined from failing or refusing to afford equal educational opportunities to all students in the Tyler Independent School District without regard to race.

2. Defendants shall immediately implement the plan of desegregation which was prepared by the Department of Health, Education and Welfare, the Texas Educational Desegregation and Technical Assistance Center and the Texas Education Agency which is designated in their report of October, 1969, as alternative plan no. 1, incorporating the provisions described on pages 6 and 7 of that report. This plan shall be amended to include the following provisions:

FACULTY AND STAFF

1. The school district to the extent necessary to carry out the faculty assignments of this plan shall direct members of its staff as a condition of continued employment to accept new assignments.

2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

3. If there is to be a reduction in the number of principals, teachers, teacher-aids, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition, if there is any such

dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such as reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any re-assignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period; in general and expanding upon the subject matter involved, five years is such a reasonable period.

MAJORITY TO MINORITY
TRANSFER POLICY

The school district shall permit a student attending a school in which his race is in the majority to choose to attend another school, where space is available, and where his race is in the minority.

SCHOOL CONSTRUCTION AND SITE SELECTION

All school construction, school consolidation, and site selection (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure once this desegregation plan is implemented.

ATTENDANCE OUTSIDE SYSTEM OF RESIDENCE

If the school district grants transfers to students living in the district for their attendance at public schools outside the district, or if it permits transfers into the district of students who live outside the district, it shall do so on a non-discriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district or reinforce the dual school system.

SIGNED and ENTERED this 27TH day of July, 1970.

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD BARNES, Plaintiff,
V
TYLER INDEPENDENT SCHOOL DISTRICT, AS EMPLOYER OF DAVID SIMMONS, SUPERINTENDENT, Defendant.

DOCKET NO. 6:04cv193

JUNE 10, 2005.

GUTHRIE, Magistrate Judge.

ORDER ON SUMMARY JUDGMENT

Came on this day to be considered the *Defendants' Motion for Summary Judgment* (Docket No. 24). After careful consideration, the Court is of the opinion that the following order should issue.

PROCEDURAL HISTORY

On April 29, 2004, the Plaintiff Gerald Barnes ("Barnes") filed the instant lawsuit against Defendant David Simons ("Simmons"), in his official capacity as superintendent only, and Defendant Tyler Independent School District "TISD"), alleging employment discrimination based upon race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3, as well as retaliation and intentional infliction of emotion distress.

The Plaintiff seeks damages because the Defendants allegedly discriminated against him by assigning him to a lower position as a supervisor and demoting him in pay as well. The Plaintiff further argues that the Superintendent retaliated against him for questioning the Superintendent's evaluation of the Plaintiff's job performance. The Defendants deny all allegations but do admit that the Plaintiff's reassignment resulted in a downward change in pay grade that was consistent with the responsibilities for his new position. The Plaintiff timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission and then received his right-to-sue letter on or about January 29, 2004.

BACKGROUND

The Plaintiff, a black male domiciled in Smith County, Texas, is currently an employee of TISD and has been so for over twenty years. The Plaintiff began with TISD as a teacher, but in 1995, he became the first African-American Assistant Superintendent for TISD. He held that position until the reorganization of the school district's central administrative staff. The School Board approved the Superintendent's plan of administrative reorganization on March 24, 2003. The reorganization affected a number of positions, including both assistant superintendent positions, which were eliminated. The reorganization also consolidated several other administrative positions and functions. Rather than being terminated, the Plaintiff was reassigned to the position of Supervisor of Transportation, while the other former assistant superintendent, a white male, was reassigned to the position of Direct of Assessment of Auxiliary Services.

The Plaintiff alleges that the title of his new position was changed from that of "Director of Transportation" to "Supervisor of Transportation" and that the position was

previously held by a white person. The Defendants agree that the title of the head of the District's transportation department was changed in the global reorganization of the District's administration and that the individual who held the position of transportation director before the administrative reorganization was a white female. However, the Defendants maintain that the Plaintiff was not demoted, but that the reassignment resulted in a downward change in pay grade that was consistent with the responsibilities for the new position.

Last, the Plaintiff argues that the Superintendent retaliated against him for questioning the Superintendent's alleged incorrect evaluation of the Plaintiff's job performance. He also submits a conclusory allegation that the Superintendent intentionally inflicted emotional distress upon him. The Defendants deny these allegations.

On March 23, 2005, the Defendants made the instant motion for summary judgment (Docket No. 24). Barnes filed his response on April 8, 2005 (Docket No. 25). The motion is now ripe for consideration.

STANDARD OF REVIEW

A party is entitled to summary judgment on all or any part of a claim "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party must show initially that there is no genuine issue of any material fact. *Anderson*, 477 U.S. at 256, 106 S.Ct. At 2514. The movant may meet this burden by pointing out the absence of evidence supporting any

essential element of the non-moving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 23-25, 106 S. Ct. 2548, 2553, 91 L. Ed.2d 265 (1986).

In deciding whether to grant a motion for summary judgment, the Court "review[s] the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 189 (5th Cir. 1991) (citing *Duvall v. The Ritz Carlton Hotel Co.*, 946 F.2d 418, 420 (5th Cir. 1991), and quoting FED. R. CIV. P. 56(c)). An issue is "genuine" only if the evidence could lead a reasonable jury to return a verdict for the nonmoving party. *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S. Ct. at 2513).

The opposing party may not rest on the mere allegations or denials of artful pleading, but must set forth affirmative facts that show a genuine issue for trial. *Anderson*, 477 U.S. at 256, 106 S.Ct. At 2514. This requires that the non-moving party make a showing sufficient to establish the existence of any element essential to that party's case, and on which that party will bear the burden at trial. *Nowlin v. R.T.C.*, 33 F.3d 498, 501 (5th Cir. 1994) (citing *Celotex*, 477 U.S. at 322-23, 106 S. Ct. at 2552-553).

ANALYSIS

It is clear from the Plaintiff's Complaint that the claims against Simmons are claims against him in his official capacity only. It is also clear that all the claims only refer to Simmons and not TISD, even though TISD is a named Defendant. The Court will address the claims against Simmons first.

DEFENDANT SIMMONS

Redundant Claims

The claims against Simmons in his official capacity are, in reality, claims against TISD. *See Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985); *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *Russell v. Edgewood Indep. Sch. Dist.*, 406 S.W.2d 249, 252 (Tex. Civ. App. - San Antonio 1966, *writ ref'd n.r.e.*). Suing a governmental official in his or her official capacity is merely another way of pleading an action against an entity of which that officer is an agent. *Graham*, 473 U.S. at 165-66. An award of damages against an official in his official capacity will be satisfied by the governmental entity itself and not from the official's personal assets. *Id.* at 163. Consequently, the defendant in an official capacity suit can assert only those defenses the governmental entity itself could asset. *Hafer v. Melo*, 502 U.S. 21 (1991).

Courts have recognized the propriety of dismissing redundant claims when claims are asserted against both an individual in his official capacity and the entity for which he works. *See Flores v. Cameron County, Texas*, 92 F.3d 258, 261 (5th Cir. 1996) (dismissing claims against County Judge in his official capacity as redundant of claims against Cameron County). In *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991), the Court noted the impropriety of allowing both "official capacity" claims and claims against the governmental entity to be maintained together. In particular the court noted:

> Because suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists a need to bring official-capacity actions against local government

> officials, because local government units can be sued directly . . . In Busby's action against the City of Orlando, the district court recognized that the intended defendant was actually the City. To keep both the City and the officers sued in their official capacity as defendants in this case would have been redundant and possibly confusing to the party.

Id. at 776.

Similarly, in *Jenkins v. Board of Education of the Houston Indep. Sch. Dist.*, 937 F.Supp. 608 (S.D. Tex. 1996), the plaintiff sued Houston ISD officials and the school district itself under the ADA. The district court determined that although the plaintiff could maintain "official capacity" claims under Title VII, it would be redundant to have both the school district and the individual officers named in the lawsuit. Thus, the district court dismissed the claims against the individual defendants in their official capacities as noted:

> Therefore, because a suit against a public employee in his or her official capacity is simply another way to sue the public entity, Jenkins cannot show that he would be prejudiced by the dismissal of the individual HISD defendants from this case in their official capacities, as HISD is already a defendant. Under these circumstances, Jenkins' claims against HISD defendants should be dismissed, as their presence in this case is merely redundant.

Id. at 613.

It is clear that the same rule applies in the instant case where the Plaintiff has asserted redundant claims by suing both

TISD and Simmons in his official capacity as TISD Superintendent. Suits against governmental officers in their official capacity are indistinguishable from suits against the governmental entity they represent. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). In such cases, the official capacity claims should be dismissed. *Id.*; *Kentucky*, 473 U.S. at 165. Therefore, the claims against Simmons in his official capacity are dismissed as redundant, which leaves only the claims against TISD remaining.

"Employer" Under Title VII

In the alternative, Simmons also asserts that he is not the Plaintiff's "employer" under Title VII. The Court agrees. There is no individual liability under Title VII. *Lissau v. Souther Food Serv. Inc.*, 159 F.3d 177, 180 (4th Cir. 1998). Because there is no individual liability under Title VII, even if the Court believed that the Plaintiff's claims against Simmons were not redundant and could be maintained against him individually, the claims must still be dismissed. The same hold true for the Plaintiff's 42 U.S. C. § 1981 claim as well as the alleged Equal Pay Act violation. TISD, not Simmons, is undisputably the employer of the Plaintiff. As such, all claims against Simmons are dismissed.

Official Immunity

Finally, even if the Plaintiff could assert any claim against Simmons individually, that claim is barred by official immunity. Official immunity protects governmental officials performing discretionary functions "from civil damages liability as long as their actions could reasonably have been though consistent with the rights they are alleged to have violated." *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 508 (5th Cir. 1992) (quoting *Anderson v. Creighton*, 483 U.S.

635, 638 (1983). Official immunity protects all but the plainly incompetent and those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). A state official exercising discretionary authority whose conduct deprives another of a right secured by federal constitutional or statutory law is nonetheless shielded from personal liability unless at the time and under the circumstances of the challenged conduct all reasonable officials would have realized that the conduct was proscribed. *Dudley v. Angel*, 209 F.3d 460, 462 (5th Cir. 2000).

To establish that a defendant is not entitled to qualified immunity, a plaintiff must satisfy a three-part test. First, the court must evaluate the claim to determine whether the plaintiff has alleged a deprivation of a protected right. *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Morris v. Dearborne*, 181 F.3d 657, 665 (5th Cir. 1999). Second the court must determine whether that right was clearly established at the time of the alleged violation. *Wilson*, 526 S. Ct. at 609. Finally, the court must determine whether the record shows that a violation occurred or at least gives rise to a genuine issue of material fact as to whether the defendant engaged in the conduct that violated the clearly established right. *Kipps v. Callier*, 197 F.3d 765, 768 (5th Cir. 1999).

Even if a defendant violated a clearly established right, he is still entitled to qualified immunity if his actions were objectively reasonable. *Id.* at 769. Objective reasonableness is a matter of law for the court to decide, not a matter for the jury. *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999). The ultimate question being whether a reasonable public officer could have believed that the actions of defendant were lawful in light of clearly established law and the information the defendant possessed at the time. *See Anderson*, 483 U.S. at 641. In analyzing this question of law, the court's focus must be on whether, when measured by an objective standard, a

reasonable official in the defendant's position would have known that his conduct was illegal. *Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992). In other words, if reasonable officials could differ as to the lawfulness of defendant's actions, defendant is entitled to qualified immunity. *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992).

Assuming that the Plaintiff has pled an individual cause of action against Simmons and can satisfy the three-prong test, it is quite clear that Simmons is still entitled to qualified immunity on any individual claims because his actions were objectively reasonable. It is not unreasonable to think that a reasonable public officer could have believed that Simmons could reorganize his central administrative staff in a way that he believed would increase administrative efficiency and accountability and best serve the school district's students and taxpayers. Again, all claims against Simmons are dismissed.

DEFENDANT TISD

Since all claims against Defendant Simmons are no longer viable, the Court will turn its attention to Defendant TISD. The claims remaining against TISD include racial discrimination as well as retaliation in violation of Title VII and the state law claim of intentional infliction of emotional distress. The Defendant does not address the discrimination or retaliation claims in its motion for summary judgment. However, TISD does address Plaintiff's intentional infliction of emotional distress claim. The Court will now address this claim.

Intentional Infliction of Emotional Distress

The Plaintiff's final claim is that Defendant TISD and the individual Defendant Simmons should be liable for

intentional infliction of emotional distress under Texas law. As this Court has previously discussed, Defendant Simmons is not liable. Thus, the following analysis concerns TISD only. The Fifth Circuit has held that inter-office behavior can arise to the level of a tort of intentional infliction of emotional distress; however, the standard is rigorous and is rarely met. A claim for intentional infliction of emotional distress may only be established by proving that the alleged tortfeasor — here, the employer — acted in a manner that was extreme and outrageous. *Wornick Co. v. Cases*, 856 S.W.2d 732, 734 (Tex. 1993). This conduct must be so extreme as to exceed "all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting Restatement (Second) of Torts § 46 cmt.d (1965)). The Court also notes that the "outrageousness" of conduct is initially a question of law for the Court. *Motsenbocker v. Potts*, 863 S.W.2d 126, 133 (Tex.App. — Dallas 1993, *no writ*).

In *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558 (5th Cir. 1998), the Fifth Circuit affirmed the district court's summary judgment as to the plaintiff's intentional infliction of emotional distress claim. The Court wrote that the defendant's purported acts were not "atrocious" enough, despite the following allegations:

(1) McConathy's supervisor, Colin Quiqley ("Quigley"), was not supportive of her during her recovery from repeated jaw surgery, and told her to "get well this time";

(2) Quigley pressured McConathy to return to work before she was fully recovered;

(3) Quigley forced her to travel on business before she had recovered from surgery;

(4) Quigley told McConathy's staff to cease communication with her concerning projects under her supervision;

(5) Quigley excluded McConathy from certain business meetings;

(6) Quigley transferred assignments away from McConathy;

(7) Quigley refused to acknowledge McConathy's presence when together; and

(8) McConathy was subsequently fired in a department reorganization.

Id. at 560-61. Despite these facts, the Court wrote that the plaintiff had not sufficiently established an intentional infliction claim.

Given this extraordinary standard, the Texas Supreme Court has held that this tort simply "does not lie for ordinary employment disputes." *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 612-13 (Tex. 1999). In *City of Midland v. O'Bryant*, the Court applied this same rule in the context of public employment. 18 S.W.3d 209 (Tex. 2000). The plaintiffs in *O'Bryant*, like the Plaintiff this case, alleged discrimination and retaliation following a reclassification of their job positions. The Court held that the decision to reclassify a job position does not rise to the level of extreme and outrageous conduct required for the tort of intentional inflictions of emotional distress. *Id.* at 217. The Court held since the wrongful transfer, failure to promote, or termination or employment does not, standing alone, constitute intentional infliction of emotional distress, then it naturally follows that

"an employer's decision to change the nature of and compensation for certain positions is not so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* As a result, the Court upheld the summary dismissal of the claim. The same result applies to this case.

Governmental Immunity

Additionally, TISD argues that the Plaintiff cannot recover for the state law claim of intentional infliction of emotional distress because governmental immunity bars the claim. Under the doctrine of governmental immunity, a unit of government may not be sued without its consent. Texas has waived immunity for school districts in very limited circumstances. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021; 101.051. In effect, the school district is immune from all personal injury and property damage suits unless the injury was caused by an employee using a motor vehicle within the course and scope of his or her employment. *Id.* The Texas Tort Claims Act specifically preserves sovereign immunity as to intentional torts. TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2); *Nueces County v. Ferguson*, 97 SW.3d 205, 223 (Texas. App.-Corpus Christi 2002, *no pet.*). Thus, Texas courts have routinely held that the claim of intentional infliction of severe emotional distress is barred as against governmental entities. *See e.g., Ferguson*, 97 S.W.3d at 233; *City of Roman Forest v. Stockman*, 141 S.W.3d 805, 813 (Tex. App.-Beaumont 2004, *no pet.*).

CONCLUSION

After a thorough review of the pleadings and the briefs of the parties, the Court holds that summary judgment should

be granted. All of the Plaintiff's claims against Defendant Simmons are redundant and barred by official immunity. The state law claim of intentional infliction of emotional distress against Defendant TISD is either factually or legally deficient. Additionally, TISD is entitled to governmental immunity on this claim as well. Even when viewing all of the evidence in the light most favorable to the Plaintiff, the Court finds that there is no genuine issue as to any material fact and Defendant Simmons is entitled to judgment as a matter of law as to all of the Plaintiff's claims. Further, the Court finds that there is no genuine issue as to any material fact and Defendant TISD is entitled to judgment as a matter of law as to the Plaintiff's state law claim of intentional infliction of emotional distress.

It is therefore

ORDERED that the *Defendants' Motion for Summary Judgment* (Docket No. 24) is hereby **GRANTED.**

It is further

ORDERED that this action be **DISMISSED WITH PREJUDICE** as to all of the Plaintiff's claims against Defendant Simmons.

It is further

ORDERED that this action be **DISMISSED WITH PREJUDICE** as to the Plaintiff's state law claim of intentional infliction of emotional distress against Defendant TISD.

It is further

ORDERED that the Plaintiff's Title VII retaliation and employment discrimination claims remain pending.

It is further

ORDERED that all further relief requested, not herein expressly granted, is hereby **DENIED.**

So **ORDERED** and **SIGNED** this **10** day of **June, 2005.**

_____

JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD BARNES, Plaintiff

V

TYLER ISD, Defendant

DOCKET NO. 6:04CV193

JUNE 16, 2005.

GUTHRIE, Magistrate Judge.

FINAL JUDGMENT

On June 14, 2005, the above styled and numbered civil action came on for trial before the Court and a jury, Judith K. Guthrie, magistrate Judge, presiding. All issues were tried and the jury rendered its verdict consisting of answers to interrogatories on that same day, finding in favor of the Defendant. All issues having been tried and a verdict duly rendered, the Court this day enters its judgment on the jury verdict. It is therefore

ORDERED, ADJUDGED and **DECREED** that the Defendant have judgment over and against the Plaintiff in this case. It is further

ORDERED that any motion not previously ruled upon is hereby **DENIED.**

It is further **ORDERED** that all costs of court are to be borne by the party incurring the same.

So **ORDERED** and **SIGNED** this **16** day of June, 2005.

JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE